United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

76-1140

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P/S

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DOCKET NO. 76-1140

UNITED STATES OF AMERICA

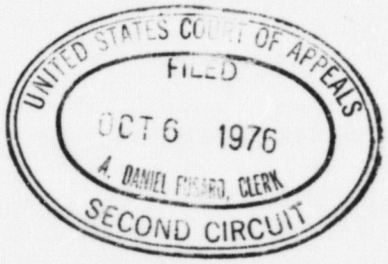
PLAINTIFF-APPELLEE

v.

DAVID N. BUBAR, ET AL.

DEFENDANTS-APPELLANTS

BRIEF OF DEFENDANT-APPELLANT ANTHONY A. JUST



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18 U.S.C. §371

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U.S.C. §1952

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to-

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management

establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more and five years, or both.

(b) As used in this section "unlawful activitiy" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics or controlled substances (as defined in section 102(6) of the Controlled Substances Act), or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor shall be conducted under the supervision of the Secretary of the Treasury.

Added Pub. L. 87-228, §1(a), Sept. 13, 1961, 75 Stat. 498 and amended Pub.L. 91-513, Title II, §701(i) (2), Oct. 27, 1970, 84 Stat. 1282.

18 U.S.C. §3481

In trial of all persons charged with the commission of offenses against the United States and in all proceedings in courts martial and courts of inquiry in any State, District, Possession or Territory, the person charged shall, at his own request, be a competent witness. His failure to make such request shall not create any presumption against him.

CONN. GEN. STAT.

§53a-113. Arson in the third degree

(a) A person is guilty of arson in the third degree if he recklessly causes destruction or damage to a building of his own or of another by intentionally starting a fire or causing an explosion.

(b) Arson in the third degree is a class D felony.

STATEMENT OF THE CASE

On May 8, 1975, a federal grand jury sitting in New Haven, Connecticut returned a twelve count indictment charging Anthony A. Just and nine others with destroying Plant No. 4 of the Sponge Rubber Products Division of Grand Sheet Metal, Inc., part of a factory complex located in Shelton, Connecticut.

The Government alleged that the defendants conspired to purchase gasoline, detonating cord and dynamite in Pennsylvania, transported it to Shelton, Connecticut, where, on the night of March 1, 1975, it was distributed throughout Plant No. 4 and, through the mechanism of a timing device, finally ignited early in the morning of March 2, 1975, totally destroying the plant. The chief executive of the corporation was charged with having ordered and paid for the arson.

In response to defendant Just's Motion to Compel the Government to Elect Between Counts or to Sever Counts, the Government elected to proceed to trial on Counts One, Two, Three, Seven, Eight and Twelve.

On September 29, 1975, hearings began on the defendants' Motions to Suppress Eyewitness Identifications. These hearings continued daily until the beginning of jury selection on October 6, 1975. Jury selection lasted three days, and the first government witness was sworn on October 16, 1975.

On October 7, 1975, the court, United States District Court Judge Jon O. Newman presiding, issued a written opinion dismissing Count Eight for failure to charge a crime.

The Government concluded its case in chief and rested on December 1, 1975.. The court denied the defendant's Rule 29 motion for a judgment of acquittal.

On December 29, 1975, the first witness for the defendant, Anthony Just, was sworn, and testimony in the defense of Anthony Just was taken until the close of business on December 31, 1975, at which time the Just defense rested.

On January 7, 1976, Judge Newman granted the defendant's motion to dismiss Count Seven for insufficient evidence, and that same day, the Government delivered its opening summation.

On January 12, defense counsel for Anthony Just summed up before the jury. The following day, January 13, the Government gave its final summation which was followed by a flurry of mistrial motions from all counsel. Judge Newman denied the defendants' motions and instructed the jury that, to the extent the Government's closing argument commented on the failure of certain defendants to take the stand, it was "improper, uncalled for and illegal."

On January 14, after being instructed on the law, the jury retired to the jury room with the four count indictment and began its deliberations.

On January 29, after over two weeks of deliberations,

the jury returned a verdict of guilty on two counts, finding Anthony Just guilty of Count One charging him with conspiring to violate the Travel Act in violation of federal law (18 U.S.C. Section 183), and, in Count Two, finding Anthony Just guilty of actually violating the Travel Act (18 U.S.C. Section 1952).

The jury reported that it was deadlocked on Counts Three and Four, and after receiving the Allen Charge from Judge Newman, the jury returned to the jury room where it resumed deliberations.

On February 5, 1976, the Court granted defendant Just's motion for a mistrial on Counts Three andFour.

On March 22, 1976, the Court sentenced the defendant to five years on Count One and five years on Count Two, the sentences to run consecutively. The defendant filed a timely Notice of Appeal and Application to Proceed In Forma Pauperis.

STATEMENT OF FACTS

Introduction

At 10:00 p.m. on March 1, 1975, three men dressed in dark clothing and wearing ski masks entered the guard room outside Plant No. 4 of the Sponge Rubber Products Division of Grand Sheet Metal, Inc. located in Shelton, Connecticut. The two guards on duty were handcuffed with their hands behind them, and a white adhesive tape was placed over their eyes. They were led into the women's restroom inside the plant where they were left, sitting on a bench in the custody of one of the masked men.

Approximately fifteen minutes later, two males in dark ski masks came upon a fireman working in the boiler room of Plant No. 4. The fireman was handcuffed and blindfolded and taken upstairs where he joined the two guards.

Some forty-five minutes later, the two guards and the fireman were taken out of the plant, placed in the back of an automobile and driven to a small dirt road outside of Shelton, Connecticut. Their handcuffs were removed and replaced with tape. They were told to remain in the car for an hour before attempting to leave, and they were also told that the keys to the car would be left on the road behind the car. A flashlight was placed outside of the car for them to use to find the car keys.

At approximately 11:30 p.m. on March 1, 1975, Plant

No. 4 was destroyed by fire.

The Government's Version

The Government claimed that the destruction of the Sponge Rubber Products Plant in Shelton was caused by an act of arson. An FBI explosives expert testified that high explosive charges and barrels of gasoline had been placed throughout the plant and connected together with detonating cord. With the triggering of the explosive charges and the detonating cord, the gasoline was ignited, thus causing the fire and destroying the building.

The Government claimed further that the arson had been ordered by the chief executive of the company, Charles Moeller, who paid certain large sums of money to his close friend and spiritual advisor, Reverend David N. Bubar of Memphis, Tennessee who, in turn, made arrangements for the plant to be destroyed.

The Government claimed that Bubar made payments to Peter Betres of Butler, Pennsylvania who allegedly assembled the actual arson squad and orchestrated the plant's destruction. According to the Government, the two leading members of the arson squad were Dennis Tiche of Boyers, Pennsylvania and his friend, John Shaw, an electrician who assembled the timing mechanism, purchased barrels for the transportation of gasoline and dynamite, and, according to the Government,

aided Dennis Tiche and his younger cousin, Michael Tiche, distribute the barrels of gasoline and the charges of dynamite throughout the plant on the evening of March 1.

According to the Government, Anthony Just's role in the arson involved the following:

(1) Through the photographic identification testimony of William Povilaitis and Walter Pinchuk, the Government sought to show that Anthony Just was at the Sponge Rubber Plant on two occasions in February (the 11th and the 17th) prior to the date of the fire;

(2) From certain phone records, the Government sought to show that Anthony Just made a series of telephone calls to phone numbers to which Peter Betres or Dennis Tiche had access, thus permitting the additional inference to be drawn that those calls were in furtherance of the conspiracy;

(3) From the testimony of certain employees of the Holiday Inn in Danbury, Connecticut and from the testimony of a Government fingerprint expert, the Government sought to show that Antnony Just -- along with Ronald Betres and Albert Coffey -- stayed in the Holiday Inn in Danbury on the night of February 28;

(4) From the testimony of John Shaw, the Government sought to show that Anthony Just was present at a noon meeting in a Howard Johnson's parking lot and thereafter participated in the arson on the night of March 1 by removing the guards from the plant.

The Defense of Anthony Just

Summary

The heart of the Just defense was the alibi testimony of nine different individuals -- some of whom were friends, some of whom were neighbors, some of whom were relatives, and some of whom were disinterested working acquaintances -- which placed Tony Just in Greensburg, Pennsylvania on the dates when the Government claimed Just was in Shelton, Connecticut in furtherance of the conspiracy.

The defendant's parallel claim of mistaken identity was bolstered by the failure of three key government witnesses to identify the defendant in the courtroom. Further testimony from FBI agents described photographic mis-identifications and non-identifications by certain witnesses, many of whom, either at a later date or during the trial, changed their testimony and made photographic identifications of Just as having been seen at the plant in Shelton.

The defendant's claim of mistaken identity gained additional weight from the testimony of a highly placed plant official who stated that an individual of the same general physical appearance as Tony Just -- same height, weight, complexion and hair length -- was touring the plant on the date that Tony Just was alleged to have been seen in the plant.

In support of the claim of mistaken identity, the defendant also argued that the photographic identification

procedures used by the Government -- including the spread itself -- were highly suggestive.

The defendant also supplied testimony which provided totally innocent explanations for phone records which showed contact between the Just household telephone and two other telephones to which defendants Peter Betres and Dennis Tiche had access.

The Alibi Witnesses

William Pierotti of Allison Park, Pennsylvania testified that, as a carpenter contractor, he did the carpentry work on a building being constructed by the defendant's brother, Carl Just of Greensburg, Pennsylvania. Pierotti testified that in February, 1975, he, along with his employee, Ed O'Brien, were working on Lot #303, Rolling Meadows in Greensburg under the supervision of Tony Just who was acting as a foreman for his brother Carl who was an invalid due to a series of heart attacks.

In his capacity as foreman, Tony Just procured material for the subcontractors and supervised alterations in the design of the house since the actual dimensions of the house were to be different from those that appeared in the blueprints. ("... it was a goofed up building to begin with." Tr. 9954)

Pierotti testified that because of the confusion, he had to consult Tony Just on a regular basis. According to Pierotti, Tony Just "was always there when I was there." Tr. 9941

Under cross-examination from the United States Attorney, Pierroti repeated that "When we was on a job, he (Tony Just) was there. All the days we worked on that house, he was there." Tr. 9958.

Pierotti's employee, Edward O"Brien, corroborated Pierotti's testimony about Tony Just's participation in the construction of the house on Lot #303. In addition, O'Brien submitted records which set forth dates, hours and locations that O'Brien and Pierotti had worked during the winter of 1975. O'Brien testified that he made entries in his notebook every evening after work to keep track of his hours for purposes of payment. (Def. Ex. 1269)

Prefacing his remarks with the statement that he was never at the Lot #303 work-site when Tony Just was not also there, O'Brien testified that his records showed that on February 17, one of the dates Tony Just was alleged to have been in Connecticut, he worked with Pierotti on Lot #303 under the direct supervision of Just. O'Brien's records also showed that on February 28, the date Tony Just was alleged to have been at the Holiday Inn in Danbury, they worked for seven hours on the same lot.

Under cross-examination, O'Brien stated that "... about every day that we worked on that job, it interrelated with Tony on account of the blue -- the condition of the blueprint and the structure of the house." Tr.

Gary Harr, the owner of the lot and of the house under construction, testified that he saw Tony Just at the building site on March 1, 1975, the Saturday that the Government claimed Tony Just was in Shelton, Connecticut participating in the arson. Tr. 10014

Harr testified that he was not a close personal friend of Just's, that he did not know Just until construction started on his house in August, 1974. Just was only someone he had gotten to know during the work on his house.

Harr testified further that he visited the site four or five times a week and kept close track of the progress. According to Harr, he "definitely" visited the construction site on Saturday, March 1 between 11:30 a.m. and 12:30 p.m. and that he was "very certain" that he saw Tony Just on the site and spoke with him. Harr testified that he remembered that date, in part, because the workers were pouring concrete for a furnace room floor.

Claude Kashinski, a laborer at the building site, corroborated Harr's testimony. According to Kashinski, when Claude was there, Tony was also there and "would tell me what to do." Tr. 10045. Kashinski could remember no days when he worked that Tony was not there. In addition, Kashinski remembered the Saturday they poured the furnace floor although he could not remember the date. Claude also remembered a day when a lot of lumber was unloaded at the site, and although he could not recall the precise date,

he remembers that Tony had been present that day.

Billy Barr, Carl Just's stepson, was also a laborer at the site who could recall no day when he worked at the site that Tony Just was not also there. On construction jobs, Tony "was basically the foreman" and Barr "was a general laborer." Tr. 10058.

Barr kept a record of his hours with a brief description of his jobs on a calendar (Def. Ex. 1268) on a day-to-day basis. To accomodate Claude Kashinski and to keep track for his stepfather, Barr also kept a running account of Claude Kashinski's hours.

From his calendar, Billy Barr was able to testify that on February 17, 1975, he had lunch with Tony Just and had a conversation with Tony about a George Washington Birthday Sale in Greensburg while returning to the site from lunch, talking in the cab of Tony's truck. Barr stated that he was "almost positive" that Tony was at the site on February 17 around the lunch hour.

With respect to February 28, Barr's calendar noted "Worked from 8:30 to 3:30 moving lumber to Lot #303." From two sales slips (Def. Ex. 1270 and 1271), Barr recalled that he had gone to Busy Beaver Lumber and picked up large quantitites of lumber for the site. Barr testified further that ordinarily when he went to pick up supplies, he did so under Tony Just's direction. Tr. 10075

With respect to March 1, there was no notation on Barr's calendar, but Barr had made an entry in the March 2

box (Sunday) which read "Saturday, nine o'clock to one-thirty" and also "Friday, nine o'clock to twelve o'clock" and also "Claude helped pour the floor."

From the calendar, Barr was able to testify that he had in fact worked on March 1 helping to pour a cement floor for the furnace room at the Harr site and that both Claude Kashinski and Tony Just were also working that day at the site. Tr. 1077.

Francis Henry of New Stanton, Pennsylvania was also involved in construction activity on the Harr site. Henry, a "primary excavator", testified that he remembered Friday, February 28 from a sales slip dated "2/28" which recorded a transaction that had caused some turmoil in his office. Def. Ex. 1272. That day, said Henry, he had been working at the Rolling Meadows site in the late morning and early afternoon, and he specifically recalled seeing Tony Just also working at the site. Tr. 10125.

Carthy Moon, aged eleven, and Denise Moon, aged fourteen, testified that they were neighbors of the Justs. One Saturday, Cathy was playing at the Justs with Carla Just when Tony's puppy, Joy, started having her puppies. Cathy testified that she knew it was a Saturday because she wasn't at school, and she hadn't yet done her homework, a task she ordinarily did on a Sunday. Tr. 10137. Cathy testified further that she specifically recalled that Tony had been at the house when the puppies were being born, along with Mr. and Mrs. Just. Cathy also testified that she remembered

that the Saturday came right after February 28 because she remembered seeing the page of the calendar at her school being torn away the previous Friday.

Denise Moon corroborated her sister's testimony, saying that she knew it was a Saturday because there was no school and because she had been watching cartoons on television. She confirmed that Cathy had called her from the Justs after lunch with news of the puppies, and that she had ridden her bicycle over to the Justs. Denise said that she saw Tony outside of the house walking from his truck talking with Mr. Just (Carl).

Mrs. Carl Just confirmed the testimony of the Moon children and referred to her family calendar, Def. Ex. 1273, which carried the notation for March 1, "Joy's Puppies. Three alive and one dead." Mrs. Just also showed the jury calendars from the years 1971 and 1973 in which she had made similar notations recording the dates on which other puppies had been born.

Mrs. Just recalled that on the day the puppies had been born, Tony had come into the house in his work clothes some time after lunch and that he had gone directly to the room which he shared with Billy Barr to change his clothes. Mrs. Just could not recall what time Tony Just left the house.

The combined testimony of these individuals conflicted with the photographic identifications of William Povilaitis and Walter Pinchuk which, according to the Government,

placed Anthony Just in Shelton, Connecticut in the late afternoon of February 17.

In addition, this evidence conflicted with the testimony of certain employees from the Holiday Inn -- also based on photographic identifications -- which, according to the Government, showed that Tony Just had been in Danbury, Connecticut on February 28 and March 1.

And finally, the testimony of Gary Harr, Billy Barr, Claude Kashinski, the two Moon Children and Dolores Just conflicted with the testimony of John Shaw that, on March 1, Tony Just had been present at a noon meeting of the arson conspirators in the parking lot of the Howard Johnson restaurant in Derby, Connecticut.

The Evidence of Mistaken Identity

The facts surrounding the identification testimony of William Povilaitis and Walter Pinchuk are described in greater detail in the first two parts of the argument below. (See the footnote on page 11 setting forth the misidentifications and non-identifications and general confusion contained in the testimony of William Povilaitis. For Pinchuk, see the facts set forth in Part II of the Argument.)

The identification testimony of Povilaitis and Pinchuk was critical to the Government's case because it placed Anthony Just at the Shelton plant some two to three weeks prior to the fire. But, in addition to the fundamental confusion surrounding the Povilaitis and Pinchuk identifi-

cations, a reliable and responsible plant official, the Chief Engineer, Steven Kordiak, testified on behalf of the defense that an individual named John Bantz had been walking through Plant No. 4 on the same date that Anthony Just was allegedly seen there. John Bantz had a physical description that coincided with the physical description of Anthony Just -- big, muscular, dark hair, dark complexion -- with one exception; John Bantz did not have a mustache.

Walter Pinchuk and Jeannette Kordiak's descriptions of the man they saw in the plant -- alleged by the Government to have been Anthony Just -- made no mention of a mustache, and Jeannete Kordiak testified positively that the man she saw, although resembling Anthony Just, did not have a mustache. There is no dispute that on the dates in question, Anthony Just wore the same large, dark bushy mustache that he wore at trial.

Phone Records

The Government made much of the fact that a number of phone calls had been made during the month of February between the telephone at Carl Just's residence in Greensburg and a series of other phones to which Peter Betres had access.

Carl Just testified that he had known Peter Betres all his life, and, in the course of his work as a builder and contractor, he often ordered material for Peter Betres

because he, Carl, could get construction material at a builder's discount. Just testified further that in January and February, Peter Betres had called him on a variety of occasions about obtaining rugs and windows for his hotel in Butler which he was remodeling. Just estimated that Betres had called him seven or eight times during the month of February, but he could not testify where those calls actually originated from.

Mr. Albert D'Andrea and Mr. Frank Riott confirmed Carl Just's testimony. D'Andrea testified that he had been asked by Just in mid-February if he was interested in doing some work in his capacity as a carpeting sub-contractor "pertaining to a hotel in Butler." Riott testified that he, too, had been asked by Carl Just in February about the possibility of purchasing windows for a hotel in Butler which was being remodeled.

In short, the apparently incriminating evidence of many phone contacts between Betres and Just had an entirely innocent explanation which was completely corroborated by the independent testimony of disinterested witnesses.

I. THE COURT ERRED IN PERMITTING WILLIAM POVILAITIS TO PRESENT HEARSAY TESTIMONY IDENTIFYING ANTHONY JUST AS "THE MAN NAMED MIKE."

Extremely damaging testimony came from William Povilaitis, the driver for the Sponge Rubber Products Division, who stated that he had on two different occasions -- once in the company of Peter Betres and David Bubar and once in the company of Dennis Tiche -- driven "a man named Mike" to the plant in Shelton and returned him to LaGuardia Airport. The Government claimed that "the man named Mike" was actually the defendant, Anthony Just, and, in the course of some of the most confused and muddled testimony presented during the trial, William Povilaitis ultimately testified to that fact.

Putting aside for a moment appellant's claim that Povilaitis' photographic identification of Anthony Just was the product of highly suggestive procedures, the appellant contends that the trial court committed serious error in permitting Povilaitis to announce to the jury early in his testimony and prior to his unsuccessful effort to make an in-court identification of Anthony Just that he had seen a picture in the newspaper of an individual he believed to be the man he had known as "Mike" and that he had also learned from the newspaper that this individual's real name was "Antonio Just."

During the identification hearing which occurred out-

side the presence of the jury, the following exchange occurred between Povilaitis and the United States Attorney:

Q: Did you subsequently learn that the man had a different name than Mike?

A: Yes. When I read it in the paper.

Q: When you read it in the paper how did you know the name was attached to or was the name of the man that you had been introduced to as Mike?

A: I could never forget that guy Mike. I had it right in my eyes all the time.

Q: Whether or not there was a picture in the newspaper at the time that you saw the man's name?

A: No.

Q: How did you know that the man that you had seen and been introduced to as Mike had a different name than Mike?

A: I read it after the bombing, after I saw the thing in the paper.

Q: What did you see in the paper?

A: I saw his picture.

Q: Was there something else stated in the paper in relation to the picture?

A: Just had his name, Antonio Just.

Q: What was his name?

A: Antonio Just.

Tr. 3678-3679

In the course of the identification hearing, it became apparent that Povilaitis was not going to identify Anthony

Just in court as "the man named Mike." During cross-examination, Povilaitis stated:

> A: I will never forget that face. He had a round face, black hair and that mustache, and I just looked at him. There was something about that guy whose face just stood in my mind and will always stay.
>
> Q: No danger of ever confusing him?
>
> A: Never confusing him with nobody.
>
> Q: You would be certain about that man ---
>
> A: Sure as I look at him here now I know him dead from right. (Emphasis added.)

Tr. 3694-3695.

In the last statement quoted above, Povilaitis was clearly referring to an individual sitting in the courtroom who was not the defendant, Anthony Just, but was his brother, Carl Just, the only person in the courtroom other than Anthony Just who had a mustache at all similar to that worn by the defendant. The United States Attorney did not thereafter -- at least during the course of the identification hearing -- ask Povilaitis to try and pick out the man he knew as "Mike" in the courtroom.

During argument and before the jury was brought in, defense counsel pointed out to the court that it appeared that Povilaitis was probably going to identify someone other than the defendant in court, and, even more importantly, that on one prior occasion, Povilaitis had identified someone else as being "the man named Mike" in a photographic spread and that on another prior occasion, Povilaitis had failed to identify

Anthony Just as "the man named Mike" when shown a spread containing a photograph of Just.*/ Counsel also noted that he had gone through the exhuastive collection of newspaper photographs and articles jointly compiled by all defense counsel in search of the picture of Anthony Just that Povilaitis claimed to have seen and that the only picture of Just that had been published had been taken with Just's jacket drawn up over his face with no portion of his face showing. Defense counsel suggested that there was considerable doubt as to the existence of such a newspaper photograph in the first place and that Povilaitis might be confused as to the source of his information as to the name "Antonio Just." Tr. 3697-3698.

In spite of the cloud of uncertainty and confusion hanging over the planned identification of "the man named Mike" by William Povilaitis, the trial court permitted Povilaitis early in his testimony to state that "the man named Mike" was really "Antonio Just." The following exchange between the United States Attorney, defense counsel and the court occurred before the jury early in the direct examination of Povilaitis:

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*/ On April 8, 1975, Special Agent Slirka showed a spread of pictures to William Povilaitis that did not include a photograph of Anthony Just. At that time, Povilaitis selected the photograph of an individual who was not Anthony Just and said he was the man he had known as "Mike" and whom he had driven to the plant on two occasions in February. Tr. 10184-10185. See also Jencks Act Material, FBI 302 Report dated 4/16/75 signed by Stephen J. Slifka.

On April 30, 1975, Slifka returned to interview Povilaitis and this time showed him a spread of photographs that did

Footnote continued on next page.

Q: Did there come a time after the fire when you came to learn that the man that had been introduced to you as Mike, what other name he was known by?

MR CRAIG: Objection. It calls for hearsay. It is straight hearsay.

THE COURT: I think he can proceed this way in view of other matters.

Tr. 3715.

Povilaitis then testified that after the fire, he saw a picture in the newspaper of the man that he had been introduced to as Mike and that under the picture was the name "Antonio Just." Tr. 3716-3717.

Throughout the balance of Povilaitis' testimony, before there had been any attempt at an in-court identification and before there had been any evidence as to photographic identifications, Povilaitis and the United States Attorney were permitted to refer to "the man named Mike" as Anthony or "Antonio" Just. See Tr. 3717 line 11, 3718 line 12, 3719 line 18, 3720 lines 13 and 19, 3721 line 22, 3723 lines 1, 2 and 22, 3724 lines 12, 3727 line 15, 3728 line 6. The attempt at an in-court identification did not occur until much later, Tr. 3752, and evidence of photographic identification was not introduced until after the in-court identification had failed. Tr. 3757-3763.

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*/ Footnote continued from preceding page.

contain a picture of Just. On this occasion, Povilaitis selected Just's picture as being the man that he had been introduced to as Mike. Tr. 63-64.

Footnote continued on following page

The appellant respectfully submits that the identification procedure permitted by the court was highly improper. To permit Povilaitis to idetnify "the man named Mike" on the basis of a newspaper picture and caption which Povilaitis claimed to have seen was grossly unfair to the defendant -- particularly when the newspaper photograph was not available for the jury to view andmore particularly when the very existence of that newspaper photograph was in grave doubt.

To permit Povilaitis to name Anthony Just as "the man named Mike" was even more unfair in light of the fact that Povilaitis was clearly confused and uncertain as to the identity of "the man named Mike" as evidenced by his difficulties with the photographic identifications and his failure during the identification hearing to select Anthony Just as "the man named Mike."

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*/ Footnote continued from preceding page.

Most surprising is the fact that on May 7, Special Agent William Craig showed the standard Tony Just spread of photographs (Hearing Exhibit 30) to William Povilaitis a second time and on that occasion, Povilaitis failed to make an identification. Tr. 508-509.

It should also be noted that the plant secretary, Jeannette Kordiak corroborated Povilaitis' original selection of an individual other than Anthony Just as being "the man named Mike." On May 12, Special Agent Craig showed Kordiak the same spread of photographs that Special Agent Slifka had shown Povilaitis on April 18, and she selected the same individual -- not Anthony Just -- as the man named Mike. Tr. 501 When shown the Just spread, she could make no identification. Moreover, on March 3, the day after the fire, Mrs. Kordiak described "Mike" as being five foot ten inches and clean shaven. Tr. 10207.

II. THE PHOTOGRAPHIC SPREAD WHICH CONTAINED A PICTURE OF ANTHONY JUST WAS SO IMPERMISSIBLY SUGGESTIVE AS TO GIVE RISE TO A VERY SUBSTANTIAL LIKELIHOOD OF IRREPARABLE MISIDENTIFICATION, AND THE RESULTING IN-COURT AND PHOTOGRAPHIC IDENTIFICATIONS OF ANTHONY JUST SHOULD HAVE BEEN SUPRESSED.

The standard spread of photographs containing the photograph of Anthony Just (Hearing Exhibit 30) was shown to hundreds and perhaps even thousands of potential witnesses in the course of the FBI's investigation of the Shelton fire. The photograph of Anthony Just which was used by the Government was different from the other photographs in the spread in such important ways as to draw the viewer's immediate attention. (See Government Exhibits 37 and 41 for two examples.)

Walter Pinchuk and William Povilaitis were shown the standard "Tony Just Spread" and they selected Just's picture as being someone that they had seen at the Sponge Rubber Plant some two or three weeks prior to the fire. (For testimony describing Pinchuk's selection, see Tr. 491-495 and 508-515; for testimony describing Povilaitis' selection, see Tr. 63-65 and 148-156.) At trial, however, neither Pinchuk nor Povilaitis were able to make a positive, in-court identification of Anthony Just, and so the fact of their prior photographic identification was admitted into evidence over the objections of defense counsel. (For Pinchuk's testimony, see Tr. 4003-4050; for Povilaitis, see Tr. 3685-3686,

3753, and 3754-3763.)*/

In Simmons v. United States, 390 U.S. 377, 384 (1968), the Supreme Court stated that convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside "if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification."

The appellant respectfully submits that the following factors set the photograph of Anthony Just apart from the other photographs, singling it out and drawing special attention to it as the photograph of the person most likely to be the suspect/target of the intestivation:

(1) The highlights in the Just photograph are different from those in the other photographs -- the contransts are much sharper, the blacks are blacker, the image is cleaner and more focused, the face is not blurry, and the photograph appears to be much more recent than the others;

(2) There is a narrow ribbon of light running across the top of Just's photograph just above his head. This is not present in the other photographs and it draws attention to the photograph of Anthony Just;

(3) Tony Just's hair is longer and blacker and

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*/ See bottom, p. 25.

his mustache is darker and bushier than the hair and the mustaches of the individuals in the other photographs;

(4) All of the other photographs have a uniformity about them that makes the photograph of Just stand out -- they have the same greyness, the same shading, the same fuzziness of the focus, and all of the individuals in the photographs except Tony Just are wearing dog tag-style chains around their necks.

Under Braithwaite v. Manson, 527 F.2d 363 (2d Cir. 1975) cert. granted U.S. (1976), "Evidence of an identification unnecessarily obtained by impermissibly suggestive means must be excluded..." In this circuit, if the identification procedures are "impermissibly suggestive," the evidence of a prior identification must be excluded irrespective of the likelihood of misidentification.

In Neil v. Biggers, 409 U.S. 188 (1972), however, the Supreme Court set forth a series of factors which a trial court should consider in measuring the likelihood of misidentification: "the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation." 409 U.S. at 198.

Taking the witness Walter Pinchuk as an example, if his testimony is viewed in the context of the Neil v. Biggers

standards, the indicia of reliability are, for the most part, absent.

Pinchuk had little opportunity or inclination to observe. He spotted the individual as he was walking swiftly through the plant. ("Never talked to any of 'em," said Pinchuk; Tr. 3981. "Well, I didn't stare at 'em;" Tr. 3982. "Well, I didn't really study 'em for height or anything;" Tr. 3983; Pinchuk saw them "Just as they walked by;" Tr. 4006. "They went right by fast;" Tr. 4008. "Well, I just looked at them fast that way to see where they're going... They walked right by me, but there was no reason to stare;" Tr. 4025. Pinchuk was watching a group. This individual was "In this bunch. Icant tell how many, but there was a group of 'em." Tr. 4026.)

Pinchuk had no particular reason to pay close attention and he testified that "there was no reason to stare." Tr. 4025.

In earlier descriptions of this individual given to the FBI, Pinchuk said that he "wasn't sure ... as to description," Tr. 4027, and, in fact, he failed to mention the existence of any mustache to the FBI in the initial interview. Tr. 4028, see also Jencks Act Exhibits, FBI 302 Report dated 3/375 signed by Special Agent Paul R. McEvoy. Moreover, in Pinchuk's testimony during the identification hearing, he described this individual again and failed to mention any mustache, testifying specifically and positively that both of the individuals lacked facial hair. Tr. 3983-3984. Pinchuk also testifed that both individuals had receding

hairlines, Tr. 3983-3984, a description that does not apply to Anthony Just.

At the time of the courtroom confrontation, Pinchuk selected Carl Just, the only other person in the courtroom who had a mustache comparable to that of Anthony Just's. Like Povilaitis before him, Pinchuk saw both Anthony and Carl Just standing up in the courtroom -- the Government had both men stand up before both of these witnesses -- and, like Povilaitis before him, Pinchuk stuck with his identification of Carl Just. Pinchuk said, "I'm going to say that one there. With the brown coat," Tr. 4009, pointing to Carl Just and obviously guessing.

Finally, Pinchuk allegedly spotted this individual in early February -- the Government claimed it was on February 11 -- and he was shown the photographic spread on May 7, 1975, some three months later. The confrontation in court occurred on November 4, 1975, a good nine months later.

Nor should it be forgotten that a man matching Pinchuk's description even to the absence of the mustache was in fact touring the Sponge Rubber Plant on February 10 and February 11. As the chief engineer, Steven Kordiak, testified later, John Bantz -- "six feet, six feet one, dark straight hair, combed back, weighed about two hundred pounds, and was an American Indian" Tr. 10244 -- was in Plant No. 4 around the time Pinchuk claims he saw Anthony Just in the plant.

There can be little doubt that Walter Pinchuk's "identification" of Anthony Just -- like William Povilaitis' identification before Pinchuk -- was fraught with the danger of error.

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*/ Robert Brown, Kristine Kesten and Kelsey O'Connor, three employees of the Holiday Inn in Danbury, Connecticut were also shown the standard Tony Just spread, and they too selected the photograph of Anythony Just as being that of an individual they had seen at the Holiday Inn on February 28 and March 1, 1975. (For testimony describing Brown's selection, see Tr. 65-66, 165-168; for testimony describing O'Connor's selection, see Tr. 66-67, 163-165; for testimony describing Kesten's selection, see Tr. 67-68, 156-161.

Brown also failed to make an in-court identification of Anthony Just. The fact that Brown had selected the photograph of Anthony Just from the spread was thereupon put into evidence -- as it was done in the cases of Pinchuk and Povilaitis. (For Brown's testimony, see Tr. 4487-4533.)

In addition to the claim that the spread itself was suggestive, the defense claimed that the identification procedure employed by the agent in procuring the initial identification from Brown had been suggestive since, prior to asking Brown to make an identification, the agent reviewed Brown's description of the suspe with him to prepare him for the selection. Tr. 4505-4507.

With respect to the testimony of Kesten and O'Connor each one of these witnesses successfully identified Anthony Just in the courtroom. (For O'Connor's testimony, see Tr. 4556-4570 and 4607-4619; for Kesten's testimony, see Tr. 4574-4589 and 4632-4649.)

The appellant contends that the in-court identifications by Kesten and O'Connor were themselves the product of the suggestive photographic spread that had been shown to them prior to the trial, and those identifications should therefore have been suppressed.

There can be little doubt that Walter Pinchuk's identification of Anthony Just was frauth with the danger of error. Because of the suggestiveness and because of the risk of misidentification, Pinchuk's identification testimony should have been suppressed.

III. THE COURT ERRED IN FAILING TO GRANT THE DEFENDANT'S MOTION FOR A MISTRIAL FOLLOWING THE IMPROPER SUMMATION BY THE U.S. ATTORNEY.

Whether to take the stand and testify in one's own defense or whether to invoke one's constitutional right to remain silent is always the most critical decision for a defendant and his counsel to make in the preparation of a defense for the jury. That decision often makes the difference in the outcome of a trial.

In making that decision, a defendant must be able to rely on certain fundamental rules of courtroom conduct which, in turn, are based on certain fundamental constitutional rights. The Fifth Amendment right to remain silent is absolute. The rule that necessarily flows from that right forbidding a prosecutor from commenting on the failure of a defendant to take the stand must be honored if the underlying right to silence is to retain its vitality.

Failure to enforce that rule after it has been breached not only penalizes an individual for exercising a constitutional privilege, thus cutting down on the privilege by making its assertion costly. Griffin v. California, 380 U.S.609, 614 (1964) It pulls the rug out from the defendant. Having already pre-

sented his case, the defendant is in no position to redress the balance or recalculate the costs of his failure to testify. His only hope lies with the corrective action of the court, and in this case, Anthony Just should be given a new trial.

The appellant chose not to testify in this multiple-defendant trial, and, given the nature of Anthony Just's defense, his decision was a very difficult one to make.

Other counsel have compiled the objectionable comments made by the United States Attorney in his closing argument. It is sufficient here to say only two things:

(1) the whole theme of the Government's closing argument was the failure of certain defendants to present evidence and, implicitly, their failure to testify;

(2) the trial judge immediately recognized the grievous error that had been committed by the Government and tried first to explain it away and then to instruct it away with some of the strongest language at his command ("... improper, uncalled for and illegal.")

In Chapman v. California, 386 U.S. 18, 24 (1960), the Supreme Court stated:

> ... certainly error, constitutional error in illegally admitting highly prejudicial evidence or comments casts on someone other than the person prejudiced by it a burden to show that it was harmless.

According to Chapman, the beneficiary of the error has the burden of proving "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained."

In Anderson v. Nelson, 390 U.S. 523, 523-524 (1968), the Supreme Court described one test of "harmless error" in these kinds of cases:

> ... comment on a defendant's failure to testify cannot be labeled harmless error in a case where such comment is extensive, where an inference of guilt from silence is stressed to the jury as a basis of conconviction, and where there is evidence that could have supported acquittal.

The appellant respectfully submits that, at least in the case of Anthony Just, the tripartite Anderson test has regrettably been met:

(1) The prosecutor's comments referring to various defendants and their failure to present evidence or explain evidence or rebut evidence were extensive;

(2) The inference of guilt was impossible to escape. The logic is simple: "If the defendants were innocent, wouldn't they have come forward and explained certain evidence and present certain other evidence? Because they did not, it is safe to infer that they are not innocent."

(3) In the case of Anthony Just, there was more than adequate evidence to support acquittal. The fact that the jury deliberated over two weeks before reaching a verdict on Counts One and Two and finally deadlocked on Counts Three and Four is sufficient in itself to show that the question of guilt or innocence was a close one.

The facts of United States ex rel d'Ambrosio v. Fay 349 F.d 957 (2d Cir. 1965) are clearly distinguishable from those here. The prosecutor's comment in the d'Ambrosio trial

was extremely brief and fleeting and, as the court concluded, ambiguous.

Similarly, in United States v. Nasta, 398 F.2d 283 (2d Cir. 1968), the prosecutor's remarks were made in response to unfair claims by the defendant in summation. The Nasta court held that the defense comments "necessitated and justified the government's remarks." No such invitation was extended by the defendants in this case.

Nor do the facts in Anthony Just's case correspond to those set forth in United States ex rel Satz v. Mancusi, 414 F.2d 90 (2d Cir. 1969) where the court found that the evidence was so overwhelming against the appellant that the error,"if it were error" would be harmless.

And the comments of the prosecution in United States v. Cusumano, 429 F.2d 378 (2d Cir. 1970) -- which were in fact taken out of context by the appellant for purposes of appeal -- were not nearly as grievous as those of the Government in this case.

Nor is Haberstroh v. Montanye, 493 F.2d 483 (2d Cir. 1974) an applicable precedent for this case. Although the remarks in Haberstroh were, as here, "clearly improper" they were (1) brief and superficial, (2) unlikely to sway the jury (3) not objected to and (4) clearly harmless.

Most circuits have adopted or approved the test set forth in Knowles v. United States 224 F.2d 168 (10th Cir. 1955) See, U.S. ex rel d'Ambrosio v. Fay, supra; United States v. Sanders, 466 F.2d 673 (9th Cir. 1972); United States v. Mahanna,

461 F.2d 1110 (8th Cir. 1972); Davis v. United States, 357 F.2d 438 (5th Cir. 1966); United States v. Williams, 521 F.2d 950 (D.C. Cir. 1975):

Was the language used "manifestly intended" or "of such acharacter that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify."

The appellant submits that the final remarks of the U.S. Attorney should be measured against this test. In light of the repeated admonitions by Judge Newman, the United States Attorney's repeated references to defendants' failures to present evidence or rebut evidence leaves little question as to the U.S. Attorney's intent.

And when the entire closing argument of the Government is designed, constructed and presented under the banner of defendants' failure to supply answers, the "natural and necessary" inference, indeed, the only inference that the jury can draw is that certain defendants did not testify because they were guilty.

Because the defendant's Fifth Amendment right to remain silent was so grossly infringed, because the defendant's decision not to testify was based on his justifiable belief that it would not be used against him, a new trial should be granted.

IV. THE DEFENDANT SUFFERED SEVERE PREJUDICE FROM THE COURT'S FAILURE TO SEVER DAVID BUBAR'S CASE FROM THE CASE OF ANTHONY JUST.

The appellant adopts the arguments of other counsel on this point and wishes to add only one observation.

Without the distractions and the disruptions of the Bubar defense, Anthony Just might well have been acquitted. As it was, the question of Just's innocence or guilt was close.

The fact that this jury acquitted Charles Moeller and Donald Connors does not alter the appellant's claim that he was severely if not decisively prejudiced by the courtroom atmosphere. The two acquittals, it should be remembered, came in cases where there were no major disputes of fact and where there was an insufficiency of incriminating evidence against the defendants. The question which was posed to the jury in the Moeller and Connors cases was whether the circumstantial evidence was sufficient to infer guilty participation on the part of Moeller and guilty knowledge on the part of Connors.

In contrast the Just case posed serious disputes of fact for the jury to consider. Fairness to Anthony Just required a jury that could coolly and carefully study demeanor evidence, measure reliability and weigh credibility. All of the difficult and complicated issues attendant to any claim of mistaken identity -- opportunity to observe, consistency of description, suggestiveness of procedures, etc. -- were present in the Just case.

The courtroom atmosphere and the curious, sometimes outrageous conduct of Bubar's defense counsel prevented the jury from focusing on precisely those complicated questions contained in the tough factual disputes presented in the Just defense. Anthony Just deserved a more attentive and uninterrupted jury.

V. THE COURT ERRED IN FAILING TO INSTRUCT THE JURY ON THE ESSENTIAL ELEMENTS OF THE UNDERLYING OFFENSE OF ARSON REQUIRED FOR CONVICTION UNDER TITLE 18, U.S.C. SECTION 1952.

The appellant adopts the arguments and claims of other counsel on this point. (See particularly the brief of appellant, Albert Coffey.)

VI. THE COURT ERRED IN REFUSING TO PERMIT COUNSEL TO IMPEACH THE CREDIBILITY OF JOHN SHAW WITH CERTAIN TESTIMONY FROM LORETTA MARLEY.

The appellant adopts the arguments and claims of other counsel on this point. (See particularly the brief of appellant, Dennis Tiche.)

CONCLUSION

For all of the reasons set forth above, the appellant, Anthony A. Just, respectfully requests that the judgments of conviction on Counts One and Two should be vacated and that the case be set down for a new trial.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above brief was sent, postage pre-paid, this, the 27th day of September, 1976, to Peter Dorsey, Esq. United States Attorney for the District of Connecticut, Post Office box 1824, New Haven, Connecticut 06511.

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